

history supports this view as well:

[A]m I correct in the view that the Commission's proceeding should consider the scarcity of broadcasting frequencies in determining whether these program formats are consistent with the public interest....

138 Cong. Rec. E2908 (October 2, 1992) (Statement of Cong. Eckart). Chairman Dingell responded in the affirmative.

By that command, Congress intended that the Commission weigh whether that part of the spectrum which is set aside exclusively for broadcasters only, see, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969), and which is being used predominantly for the broadcast of commercial matter, would be put to better use by another user. The Commission is to consider under Section 4(g), then, whether the public interest is better served by the use of such spectrum by police, fire or other emergency services, or by other commerce-producing broadcast services such as land mobile communications.

But NAB, SKC and HSN take the narrow view when they claim variously that there is no or "little competing demand" for frequencies now used by home shopping stations. HSN and SKC claim that when HSN acquired these stations in the mid-1980's, they were the "only proposed use of the frequency." HSN Comments at 36. Even assuming, arguendo, that was the case then, with the many new technologies requesting use of spectrum, it certainly is not true in 1993. For example, a large chunk of the UHF spectrum has already been reallocated to land mobile communications.

HSN, SKC and NAB also assert that because only one home shopping licensee has been subject to a competing application at renewal, "that there is little competing demand." NAB Comments at 9. See, SKC Comments at 49 n. 64; HSN Comments at 37 n. 50. This argu-


ment, again, ignores other uses for the spectrum. And it overlooks the realities of the license renewal process. There are good reasons for the dearth in competitive applications, and they extend to all license renewals, not just home shopping licenses. "TV License Renewals Since Oct. 1991," Broadcasting Magazine, April 12, 1993 at p. 62 ("674 stations requesting renewal...11 challenged by competing applicants). The "renewal expectancy" granted the vast majority of incumbent licensees, which virtually guarantees renewal, and the Commission's limitations on settlements have made successful renewal challenges virtually futile and extraordinarily costly. "Washington Watch," Broadcasting, May 6, 1991.

**CONCLUSION**

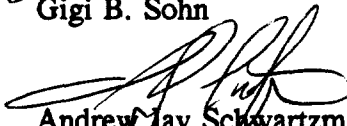
CSC urges the Commission not to be misled by the small amount of community responsive programming provided by stations predominantly utilized for home shopping programming. What the Commission must decide is whether it is in the public interest to have the public's airwaves used primarily for the dissemination of commercial matter. The Commission has the authority and the duty to answer that question in the negative.

The Commission must also not be deceived into believing that it will disserve minority-owned stations and the minority communities they serve to limit this commercial matter. With a bit of help and guidance from the Commission, these stations can be converted from stations which are compelled to devote an overwhelming amount of their broadcast day to satellite delivered, non-minority commercial matter to ones that are largely devoted to serving the unmet needs of their communities.

Respectfully submitted,



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April 27, 1993

**EXHIBIT A**



# Cornell Law School

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June 5, 1992

Representative John D. Dingell  
Chairman, House Committee on Energy and Commerce  
2125 Rayburn House Building  
Washington, D.C. 20515

Dear Chairman Dingell:

I write with regard to the constitutionality of Representative Ritter's amendment to H.R. 4850, an amendment that would neither require nor prevent cable systems from carrying commercial television stations or video programming services that are "predominantly utilized for the transmission of sales presentations or program length commercials." The amendment was adopted by the House Subcommittee on Telecommunications and Finance on April 8, 1992.

I am a Professor of Law at Cornell University. I have also taught in the law schools at Boston University, Harvard University, the University of Michigan, and UCLA. I have written extensively on the First Amendment. I am the principal co-author of The First Amendment: Cases-Comments-Questions (West Publishing Co. 1991) (with Dean Choper of Berkeley). the most extensively used casebook in the

Must-carry rules have twice been declared unconstitutional. If H.R. 4850 becomes law, must-carry will be challenged again. Again it will be claimed that government is wrongly substituting its conception of good speech for that which would be chosen in the editorial discretion of the cable system operator. What better present could be provided to a litigator opposing must-carry legislation than the granting of privileged access to cable for televised-shopping stations predominantly utilized for sales presentations? What litigator would not use the forced imposition of commercialism as exhibit A in an attempt to show that the private editorial decisions of cable system operators are superior to those mandated by big government? Those who seek to defend must-carry legislation will have a hard enough road to hoe without providing this kind of litigating advantage to their opponents. The granting of privileged access to cable for televised-shopping stations is a river boat gamble that the proponents of must-carry need not and should not take.

Sincerely,

A handwritten signature in dark ink, appearing to read "Steven H. Shiffrin", with a stylized flourish at the end.

Steven H. Shiffrin  
Professor of Law

**Statement of**

**Steven H. Shiffrin  
Professor of Law  
Cornell University**

**Regarding**

**The Ritter Amendment  
to H.R. 4850**

**To the**

**Committee on Energy and Commerce  
United States House of Representatives**

**June 5, 1992**

I appreciate the opportunity to submit this statement to the Committee regarding the Ritter Amendment to H.R. 4850, the Cable Television Consumer Protection and Competition Act of 1992.

My name is Steven Shiffrin. I am a Professor of Law at Cornell University. I have also taught in the law schools at Boston University, Harvard University, the University of Michigan, and UCLA. I have written extensively on the First Amendment. I am the principal co-author of The First Amendment: Cases-Comments-Questions (West Publishing Co. 1991) (with Dean Choper of Berkeley), the most extensively used casebook in the field. I also co-author a set of casebooks that together with their yearly supplements are widely used in American law schools. For example, I am the co-author responsible for freedom of speech in Constitutional Law: Case-Comments-Questions (West Publishing Co. 7th ed. 1991) (with William Lockhart, Yale Kamisar, and Jesse Choper).

I write with regard to the constitutionality of Representative Ritter's amendment. Subject to exceptions not important here, the must-carry provisions of H.R. 4850 would effectively force cable system operators to allocate a certain percentage of their channels to retransmit qualified local broadcast signals (the "must-carry" rules). A major purpose of H.R. 4850 is to assure that cable system operators not exclude local sources of news and diverse programming. If passed, the must-carry rules would be premised in large part on the view that the "public's right to receive a diversity of voices is served by ensuring public access to free local broadcast television

stations." H.R. Rep. 101-682, 101st Cong., 2d Sess. 62 (1990). Recognizing a potential conflict with the public interest, Congressman Ritter proposed an amendment to the must-carry provisions of H.R. 4850 to ensure that cable system operators would not be forced to carry the signal of any commercial television station that is "predominantly utilized for the transmission of sales presentations or program length commercials." The amendment was adopted by the House Subcommittee on Telecommunications and Finance on April 8, 1992.

The Ritter Amendment is clearly constitutional. Assuming Congress decides to enact must-carry rules of the type specified in H.R. 4850, Congress need not confer must-carry status on every type of broadcast station, including those stations utilized primarily as conduits for virtually-continuous sales presentations.

Congress has broad latitude in dealing with commercial speech. In appropriate circumstances such as these, it can discriminate against commercial speech; it can discriminate between types of commercial speech; and it certainly can decide to support local programming without supporting all types of local programming

- \* particularly when it has not engaged in point of view discrimination

- \* when it continues to permit cable system operators broad discretion to carry televised-shopping broadcasters or networks

- \*when it leaves televised-shopping channels on a level playing field

\* and when it has forged a good faith accommodation among the rights of cable system operators, speakers, and audiences.

Indeed, to saddle cable system operators with a forced regime in which televised-shopping stations are coercively granted privileged access raises constitutional questions that would seriously imperil must-carry legislation.

#### DISCUSSION

For constitutional purposes, commercial speech is that speech which "propose[s] a commercial transaction." Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976). Accord Board of Trustees v. Fox, 492 U.S. 469, 473-74 (1989); Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328, 340 (1986). Since the Ritter Amendment focuses upon stations that are "predominantly utilized for the transmission of sales presentations or program length commercials," the amendment has plainly targeted commercial speech.

This conclusion is not affected by the fact that such stations may include entertaining material. Indeed, the Court has firmly held that speech proposing a commercial transaction falls within the commercial speech category even if it contains a message of genuine political or public interest. In Board of Trustees v. Fox, 492 U.S. 469, 473-74 (1989), for example, sellers of housewares had marketed their goods by resort to "Tupperware parties" in college dormitories. The sellers argued that their speech was outside the commercial speech category because during the course of the parties

the sellers discussed matters such as how to be financially responsible and how to run an efficient home. The Court observed that "[n]o law of man or nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares,"<sup>1</sup> The Court easily concluded that the Tupperware party was an exercise in commercial speech:

"Including these home economics elements no more converted [the seller's] presentations into educational speech, than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech. As we said in Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 67-68 (1983), communications can 'constitute commercial speech notwithstanding the fact that they contain discussions of important public issues. \* \* \*'"<sup>2</sup>

Whether intermittent conversation on a televised-shopping station is about recipes, home economics, or even discussions of important public issues, the fact is that a station predominantly utilized for the transmission of sales presentations is engaged in commercial speech and is subject to the commercial speech doctrine.

As the Court stated in Fox, that doctrine does not afford commercial speech full First Amendment protection:

"Our jurisprudence has emphasized that 'commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of first

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<sup>1</sup>. 492 U. S. at 474.

<sup>2</sup>. Id. at 474-75.

amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.'<sup>3</sup>

Thus, even though content regulation of non-commercial speech for the most part is permitted only under extraordinary circumstances, the standards involving commercial speech are far more relaxed.

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) is an important case in point. San Diego enacted an ordinance that imposed substantial restrictions on the display of outdoor advertising signs. The ordinance permitted onsite commercial signs, but with few exceptions prohibited noncommercial signs and offsite commercial signs.<sup>4</sup> The Court held that San Diego could ban commercial billboards without banning non-commercial billboards and that it could ban off-site commercial billboards without banning on-site commercial billboards. Thus government could favor noncommercial speech over commercial speech and some forms of commercial speech over others.<sup>5</sup>

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<sup>3</sup>. 492 U.S. at 477 (emphasis added), quoting *Ohralik v. Ohio Bar Ass'n.*, 436 U.S. 447, 456 (1978).

<sup>4</sup>. Thus a market could advertise itself and its products on the property where the market stood, but not off the site of the market, e.g., down the block.

<sup>5</sup>. San Diego was not similarly free to favor commercial speech over noncommercial speech. White, J., joined by Stewart, Marshall, and Powell, JJ., found the ordinance defective first, because it discriminated against noncommercial speech (permitting commercial signs on business sites while prohibiting non-commercial signs) and second, because it discriminated between types of noncommercial speech (making exceptions for signs involving governmental functions, time/weather/news public service signs, and temporary political campaign signs). Brennan and Blackmun, JJ., concurred on different grounds.

The Court again recognized the lesser degree of protection for commercial speech and observed that so long as substantial interests were furthered in accord with constitutional prerequisites,<sup>6</sup> the ordinance was constitutional. As Justice White explained, that test was easily met:

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The Court made it clear, however, that if the statute's severability provision was interpreted to prohibit offsite commercial signs while permitting onsite commercial signs and noncommercial signs generally, the First Amendment did not stand in the way. See White, J., joined by Stewart, Marshall, Powell, and

"\* \* \* San Diego has obviously chosen to value one kind of commercial speech -- onsite advertising -- more than another kind of commercial speech -- offsite advertising. The ordinance reflects a decision by the city that the former interest, but not the latter, is stronger than the city's interests in traffic safety and esthetics. The city has decided that in a limited instance -- onsite commercial advertising -- its interests should yield. We do not reject that judgment. As we see it, the city could reasonably conclude that a commercial enterprise -- as well as the interested public -- has a stronger interest in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere. It does not follow from the fact that the city has concluded that some commercial interests outweigh its municipal interests in this context that it must give similar weight to all other commercial advertising. Thus, offsite commercial billboards may be prohibited while onsite commercial billboards are permitted."<sup>7</sup>

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<sup>7</sup>. Id. at 512 (emphasis added). For cases following Metromedia, see, e.g., Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172 (4th Cir. 1988); Wheeler v. Commissioner of Highways, 822 F.2d 586 (6th Cir. 1987); Major Media of the Southeast v. City of Raleigh, 792 F.2d 1269 (4th Cir. 1986); National Advertising v. Downers Grove, 561 N.E.2d 1300 (Ill.App. 1990). See also Ackerly Communications of Massachusetts, Inc. v. City of Somerville, 878 F.2d 513, 522 n. 16 (1st Cir. 1989) (citing Naegele, supra with approval).

Similarly, it does not follow from the fact that government would require cable system operators to carry broadcast stations that contain commercial advertising mixed in with regular programming that it must require cable system operators to carry those shopping stations predominantly utilized for the transmission of sales presentations or program-length commercials.

Indeed, it is not even clear that the Ritter Amendment would have to meet the kind of test applied in Metromedia. Metromedia involved a ban of commercial speech on offsite billboards. The Ritter Amendment bans no speech. It merely refuses to give predominantly-commercial broadcasters the extraordinary benefits of must-carry.<sup>8</sup>

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Another significant case indicating the low level of protection for commercial speech is Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, *supra*. In Posadas, a gambling casino in Puerto Rico objected to legislation that prohibited gambling casinos from advertising to Puerto Rican residents. Puerto Rico permitted other forms of gambling to its residents including advertising for horse racing, cockfighting, and the lottery. One gets the impression that some lobbies were just stronger than others. Nonetheless, even without legislative findings, the Court upheld the Puerto Rican legislative scheme.

The one circumstance in which commercial speech has been afforded meaningful protection has been when government attempted to suppress a particular truthful message. Most of those cases have involved attorney advertising. For example, in the most recent case, Peel v. Attorney Registration and Disciplinary Commission of Illinois, 110 S.Ct. 2281 (1990) invalidated a rule prohibiting an attorney from stating on his letterhead that he had been certified by a nationally prominent organization. Even that decision was 5-4 and two of the Justices in the majority (Brennan and Marshall, JJ.) have since resigned from the Court.

<sup>8</sup>. Thus the appropriate analogy might be to Rust v. Sullivan, 59 U.S.L.W. 4451 (U.S. May 23, 1991). The Court there held that government could subsidize the giving of advice about family

But assuming the Ritter Amendment were treated as a regulation of commercial speech, substantial interests would support it. Congress is entitled to the view that the interest in sponsoring local news and diverse programming which it believes outweighs the free speech interests of the cable system operators is not of similar weight when a broadcast station used predominantly for commercial speech is involved. The Ritter Amendment leaves to the cable system operator the discretion to determine whether to carry a health channel, CSPAN, CSPAN II, or other diverse fare such as movies, sports, music, or specialized presentations aimed at individual segments of the national audience -- or a televised-shopping channel. It would be singularly odd if the First Amendment were read to require government to discriminate in favor of commercial speech.

Indeed, a must-carry bill that did not include the Ritter Amendment would itself present serious constitutional problems. In striking down previous must-carry legislation, Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1452 (D.C.Cir. 1985), cert. denied, 476

planning while excluding the use of its benefits for information about abortion. Rust is an enormously controversial decision given

U.S. 1169 (1986) recognized that substantial First Amendment interests were at stake. The Court noted that the rules were "explicitly designed to '[favor] certain classes of speakers over others.'" Id. at 1451. That kind of favoritism was seen to impinge not only on the constitutional interests of cable programmers and their intended audiences, but also constituted a deep intrusion into the editorial autonomy of cable system operators. So understood, must-carry rules must at the very least meet the requirements of United States v. O'Brien, 391 U.S. 367 (1968)<sup>9</sup> and may ultimately be required to meet even more stringent requirements.

Although there is constitutional controversy about what First Amendment test benefits cable system operators, it is clear that impositions upon cable system operators have been looked at with substantial care, and must-carry provisions have twice been invalidated. See Quincy, supra: Century Communications Corp. v. FCC, 835 F.2d 292 (D.C.Cir. 1987), clarified, 837 F.2d 517 (D.C.Cir. 1988), cert. denied, 108 S.Ct. 2014 (1988). Among other things, Quincy objected to the fact that the must-carry rules "indiscriminately protect each and every broadcaster regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable system operator." 768 F.2d at 1460. See also Century Communications, 835 F.2d at 295.

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<sup>9</sup>. O'Brien requires a showing that legislation furthers a substantial governmental interest by means no greater than essential to further that end.

As the Seventh Circuit recognized in Chicago Cable Communications v. Cable Comm'n, 879 F.2d 1540, 1550 (1989), the "important qualities embodied in the term 'localism'" include community pride, cultural diversity" and the like. Nationally-broadcast commercial speech hardly fits the associations connoted by the term localism. Even if commercial speech fit the conception of localism, Quincy would seem to call for a determination of the extent to which the imposition of more commercial speech through mandatory access for televised-shopping stations would be piled on top of already existing local advertising. No court could possibly miss the fact that there is no shortage of commercials on television today. 10

there has been no showing that the inclusion of televised-shopping

[REDACTED]

[REDACTED]

propagate opinion. This is in keeping with our constitutional traditions.

Indeed, the Ritter Amendment strengthens the constitutional case for must-carry legislation. It shows that Congress has appropriately considered the rights and interests of cable system operators without blindly pursuing a distorted conception of localism. It shows Congressional sensitivity to long recognized constitutional values.

Must-carry rules have twice been declared unconstitutional. If H.R.4850 is passed, must-carry will be challenged again. Again it will be claimed that government is wrongly substituting its conception of good speech for that which would be chosen in the editorial discretion of the cable system operator. What better

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June 9, 1992

ARLIN M. ADAMS  
215-751-2072

Representative John D. Dingell  
Chairman, House Committee on Energy  
and Commerce  
2125 Rayburn House Building  
Washington, D.C. 20515

Re: Proposed Cable Must-Carry Provisions

Dear Mr. Chairman:

Enclosed is a constitutional analysis prepared by myself and Deena Schneider, of our office, covering the must-carry provisions of H.R. 4850, the Cable Television Consumer Protection and Competition Act, and the amendment to that bill offered by Representative Ritter to exclude from the general must-carry rules commercial television stations predominantly used for "sales presentations or program-length commercials." The House Subcommittee on Telecommunications and Finance adopted this amendment to H.R. 4850 on April 8, 1992.

During my tenure on the United States Court of Appeals, in my practice, and as a result of teaching First Amendment courses at the University of Pennsylvania Law School, I developed considerable expertise in this area. My colleague Deena Schneider's practice has for some time involved her in First Amendment issues in the communications field, particularly with respect to the cable industry.

As our analysis shows, in our judgment the general must-carry provisions of H.R. 4850 may well violate the First Amendment. The amendment to these provisions proposed by Representative Ritter and incorporated by the Subcommittee serves the salutary purpose of bringing H.R. 4850 into greater congruence with its apparent purposes and thus reduces the possibility that the bill will be declared unconstitutional. In our view, the amendment does not raise additional First Amendment issues.

## SUMMARY

The House is currently considering inclusion of "must-carry" provisions in H.R. 4850, the Cable Television Consumer Protection and Competition Act adopted by the House Subcommittee on Telecommunications and Finance on April 8, 1992. Under must-carry, cable systems would be required to carry as part of their program offerings the broadcast signals of qualified television stations within the local viewing areas of their communities. The Subcommittee has incorporated into H.R. 4850 an amendment offered by Representative Ritter that excludes from the general must-carry requirements commercial television stations that are predominantly used for "sales presentations or program-length commercials."

The must-carry provisions under consideration raise several significant constitutional questions:

1. There Is a Significant Issue Concerning Constitutionality of Any Must-Carry Provisions.

-- Two sets of must-carry rules adopted by the FCC have already been rejected by the Courts under the First Amendment.

-- To withstand inevitable constitutional scrutiny, any new must-carry provisions will have to be precisely drawn so as to be necessary to further the government interests that supposedly support the must-carry concept: the fostering of the local system of broadcasting, diversity of programming, and competition among programmers.

2. Provisions That Would Require Home-Shopping and Other Direct-Marketing Dominated Stations To Be Carried on the Basic Tier Would Be Unconstitutional.

-- Requiring cable systems to carry home-shopping and other direct-marketing dominated stations would not enhance localism, program diversity, or competition (the apparent government interests supporting must-carry), and would therefore violate the First Amendment.

-- Provisions granting must-carry status to home-shopping and other direct-marketing dominated stations would provide an irrational and unfair preference to one competitor in the marketplace and would encourage the conversion of television stations to home-shopping and direct-marketing formats. Because neither result forwards the supposed purposes of must-carry, these provisions would be unconstitutional.

3. The Ritter Amendment Excepting Home-Shopping and Direct-Marketing Dominated Stations from the General Must-Carry Provisions of H.R. 4850 Alleviates the First Amendment Concerns That Would Result from Granting These Stations Must-Carry Status.

-- The amendment applies to all home-shopping and direct-marketing dominated stations and allows cable operators to decide for themselves whether to carry such stations.

-- In fine-tuning H.R. 4850 to bring it into greater congruence with its apparent purposes, the amendment in fact enhances the possibility that must-carry will pass constitutional muster and will not itself be constitutionally infirm.

## DISCUSSION

1. In Order To Survive Challenge Under the First Amendment, Any Must-Carry Provisions Adopted by Congress Must Be Precisely Drawn To Further a Substantial Governmental Interest with the Narrowest Necessary Effect on Speech.

Any must-carry provisions that are included in a cable bill will be subject to challenge under the First Amendment. The Courts have already struck down two sets of must-carry rules adopted by the FCC.<sup>1</sup> It is clear from these and other applicable decisions that to be sustained under the First Amendment, any new must-carry provisions will have to be drafted with great precision.

In its Quincy decision rejecting the FCC's first version of must-carry rules, the Court of Appeals for the District of Columbia Circuit held that such rules cannot pass constitutional muster unless they "further an important or substantial governmental interest [and] the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."<sup>2</sup> The Court then determined that the FCC had failed to demonstrate either that the rules furthered a substantial governmental interest or that they were drafted as narrowly as possible to accomplish that interest.

The basis for the must-carry rules articulated by the FCC in Quincy was the supposed threat to the system of local broadcasting presented by the potential exclusion of local sta-

